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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

The Future of Effective Leniency Programmes – Note by South Africa

13 June 2023

This document reproduces a written contribution from South Africa submitted for Item 5 of the 137th meeting of Working Party 3 on 13 June 2023.

More documents related to this discussion can be found at
<https://www.oecd.org/competition/the-future-of-effective-lenency-programmes-advancing-detection-and-deterrence-of-cartels.htm>

Antonio CAPOBIANCO
Email : Antonio.CAPOBIANCO@oecd.org

JT03520765

South Africa

1. Introduction

1. The Competition Commission of South Africa (“CCSA”) welcomes the opportunity to contribute to this important discussion about the future of leniency programmes and support the call for competition agencies to strengthen their leniency regimes by focusing more on proactive tools to detect potential violations of competition laws. Without proactive tools, competition authorities will miss cases simply because no one reported them.

2. Developing Proactive Detection Tools and Investigative Approaches

What proactive or ex-officio tools and/or investigative approaches does your agency currently rely on outside of the leniency context to detect cartels and other anticompetitive conduct?

2. The Commission proactive tools include:
- Market monitoring – important sectors such as fresh produce.
 - Market Inquiries
 - Data screening in public procurement.
 - Scoping studies
 - Cooperation with other agencies or foreign competition agencies
3. These ensures that we do not miss cases that no one reported.

What new, proactive, and/or innovative tools and investigative approaches is your agency working to develop (or planning to develop) outside of the leniency context to detect cartels and other anticompetitive conduct?

4. We have set up a small forensic laboratory with few machines that we can use to conduct small scale copying and imaging of laptops.

Are the detection tools and/or investigative approaches your agency currently has effective enough to incentivize leniency applications? If not, are you considering adoption of other tools as a means of reinvigorating leniency programmes?

5. To meet the new challenges of digitalization, we need to increase the capacity of our forensic laboratory by investing in more screening techniques such as data analytics and algorithms to detect cartels.

Besides the reform of leniency programmes, have you made or are you planning to make any changes with respect to detection tools and/or investigative approaches, including development of intelligence programs, the adoption of whistleblower programmes, or use of data analytics/cartel screens?

6. Yes.

If you have recently adopted new detection tools and/or investigative approaches, what results have you seen so far? What lessons have your learned that would be helpful to pass on to agencies considering similar reforms?

7. Still too early to tell. We still must receive training from external partners on how to use the various machines in the laboratory. We also need to capacity the screening unit with forensic analysts and lawyers.

What proactive detection tools, investigative approaches or investigative authorities does your agency not have that you would be interested in learning more about?

8. Intelligence programs such as surveillance and wiretapping as traditional law enforcement agencies like police agencies.

Are there legal impediments that prevent your agency from using specific types of detection tools and/or investigative approaches? (For example, competition agencies do not always have the same legal authority to use tools like surveillance, witness interviews, consensual recording, and wiretapping as traditional law enforcement agencies like police agencies.)

9. Yes- Surveillance and wiretapping is not allowed.

Are you able to collaborate effectively with international partners on your cases, including cartel cases? If not, why not?

10. Yes. We effectively collaborate with other competition agencies around the world.

3. Recent Trends & Reforms of Leniency Programmes

Is there a leniency programme in place in your jurisdiction?

11. Yes.

Have you observed any changes in the quality of the leniency applications over time (e.g., seriousness of violations, the quality and amount of information provided)?

12. Yes. We have seen an increase in the number of leniency applications in respect of cross-border cartels that have already been filed in other jurisdictions, especially in Europe and the USA and Americas.

Have you identified any trends in the number of leniency applications in your jurisdiction? If so, in your view what are the reasons for such trends?

13. Yes- we have seen a decline in the number of applications especially for domestic cartels. We think this decline is attributable to the risk of being caught and punished. In South Africa, the use of characterisation defence by firms alleged to be colluding encourages firms to take their chances because they have been able to win cartels cases based on characterisation.

Has your leniency programme been recently amended? If so, what amendments have been made and for what reasons were they made?

14. No.

Have you assessed the impact of any such amendments? Have you observed any changes in the number of leniency applications.

15. We have had no amendments.

If your jurisdiction provides for settlement procedures or plea bargains, how do they affect the leniency programme?

16. South Africa's leniency programme provides total immunity to a successful applicant that is first through the door (i.e., first to apply). Any subsequent firm that intends to apply for leniency is allowed to settle the matter with the Commission on favourable

terms. In this regard, we think our settlement procedures positively affect the leniency program in the sense that if a firm does not get leniency, they can settle the matter with the Commission on favourable terms.

4. Conclusions

17. The move from more traditional cartels to algorithmic cartels competition agencies should enhance their proactive cartel detection tools such as the use of forensic laboratories and other data analytics systems to encourage self-reporting thus keep their leniency programmes relevant.

18. Without proactive tools, a competition authority will miss cases simply because no one reported them. The greater the efforts made by competition authorities to identify possible breaches of competition laws and initiate investigations on their own initiative (ex-officio), as opposed to more reactive detection tools, the more effective the leniency programme will be, as more firms will be incentivized to apply for leniency.